Filed 4/2/19 P. v. Voyt CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MIREK VOYT,<br><br>Defendant and Appellant. | B289379<br><br>(Los Angeles County Super. Ct. No. PA 088150) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed with directions.

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David Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Mirek Voyt of (count 1) kidnapping to commit oral copulation by force or fear (Pen. Code, § 209, subd. (b)(1)),[1] and (count 2) forcible oral copulation by force or fear. (Former § 288a, subd. (c)(2).)[2] The jury also found that Voyt personally used a firearm in committing both offenses. (§ 12022.53, subd. (b).) With respect to count 2, the jury found that Voyt committed a sex offense in which he personally kidnapped the victim and tied and bound him. (§ 667.61, subds. (a), (c)(7), (e)(1) & (e)(5).) The trial court sentenced Voyt to 25 years to life for count 2, plus an additional 10 years for the firearm enhancement. The court also sentenced Voyt to life imprisonment plus 10 years for the firearm enhancement for count 1, but the court stayed this portion of the sentence pursuant to section 654. In addition to other fines, the trial court imposed a sex offender fine of $400, plus penalty assessments of $680.

Voyt contends that the trial court abused its discretion by admitting into evidence pornographic images recovered from a USB thumb drive found in a closet in the apartment he shared with his husband, as well as physical evidence also found in the appartment. He contends that the evidence was both irrelevant and substantially more prejudicial than probative. Voyt also contends that the court imposed an excessive sex offender fine. We agree with Voyt with respect to the fine, but we otherwise affirm.

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

[2] Section 288a has subsequently been amended without relevant substantive change and renumbered as section 287. (See Stats. 2018, ch. 423, § 49, pp. 3215–3218.)

## FACTS AND PROCEEDINGS BELOW

This case is based on events that occurred in 2001. The case remained unsolved until a DNA test in 2017 matched Voyt with DNA samples recovered on the victim in 2001. The prosecution filed an information against Voyt in 2017, and the trial took place in 2018. Because both charges carried potential life sentences, no statute of limitations applied to either count. (See § 799, subd. (a).)

On the morning of June 22, 2001, Voyt approached 14-year-old M.M. and O.H. as they were walking together about a block away from M.M.'s house in Northridge. Voyt said something like, "You want to see something?" He opened a box he was carrying, pulled out a gun, pointed it toward M.M. and O.H., and told them not to move. O.H. ran away, but M.M. stayed. Voyt grabbed M.M. by the hand, forced him into a nearby car, put a blanket over his head and drove away.

Voyt pulled into a garage, grabbed M.M. out of the car, and pulled him into the house. M.M. could see a red sports car parked in the garage, and as he walked from the garage into the house, he could also see a swimming pool in the backyard on the other side of some sliding doors.

For most of the time M.M. was in the house, Voyt held a stainless steel semiautomatic pistol in his hands. M.M. did not remember if Voyt pointed the gun at him.

Inside the house, Voyt sat M.M. down in a chair and used plastic zip-ties to secure his ankles and wrists to the arms and legs of the chair. M.M. asked Voyt to let him go, but Voyt refused. Voyt told M.M. that he had to do this because someone did it to him, and M.M. looked like the person who had done it to

him. Voyt poured shot glasses of alcohol into M.M.'s mouth and told him to take his clothes off.

M.M. refused. Voyt brought a metal nutcracker from the kitchen and threatened to crack M.M.'s testicles and rape him if he did not comply. Voyt then cut off the plastic ties one at a time to allow M.M. to remove his clothing. Once M.M. was naked, Voyt took off his own clothing. He told M.M. he did not want to hurt him but only wanted to touch him. Voyt touched M.M.'s penis with his hands and mouth until M.M. ejaculated.

Voyt cut the zip-ties and walked M.M. to the bathroom to allow him to urinate. He then moved M.M. to an office adjoining the bathroom, laid him on the ground, tied his arms to a rolling office chair, and again stimulated M.M.'s penis with his hands and mouth. Once M.M. had an erection, Voyt sat on M.M.'s penis, attempting to penetrate his own anus with M.M.'s penis. M.M. struggled to resist, and eventually Voyt grew tired, uncuffed M.M. from the chair, and took him to the living room.

In the living room Voyt played gay pornography on the television. Voyt told M.M. he was going to let him go and asked M.M. if he wanted some money. M.M. refused, but Voyt put approximately $300 in M.M.'s wallet anyway. He put M.M. back in the car, telling him to keep his head down so that he could not see where he had been or where he was going. Voyt then dropped M.M. off near the area where he had first picked him up.

After O.H. ran away from Voyt, he told his parents what had happened, and they called the police. By the time M.M. walked back to his house after Voyt released him, police officers were already present. M.M. told the officers what had happened, and they took him to a nearby hospital where a forensic nurse took swab samples from M.M.'s penis, scrotum, and anus. The

nurse also documented ligature marks on M.M.'s wrists, suggesting that he had been restrained.

In 2009, a criminalist with the Los Angeles Police Department sent portions of the DNA samples to a lab for testing. The lab tested the samples and, in February 2017, compared the samples against a sample taken from Voyt. The lab determined that the samples from M.M.'s scrotum and penis matched with Voyt's DNA profile. The probability that an unrelated person chosen at random from the population would have a DNA profile matching the sample taken from M.M. was no more than one in 10 sextillion.

On February 14, 2017, police officers searched the apartment where Voyt lived with his husband A.S. During the search, they found a photo of Voyt and A.S. together taken in 2000 that matched M.M.'s description of a photo he had seen during his kidnapping. They also found zip-ties that M.M. said were similar to the ones his attacker had used to restrain him. Officers also found a metal nutcracker in a kitchen drawer. A.S. testified that the zip-ties and nutcracker did not belong to him. The police also found a photo of a red Ford Mustang matching the description of the car M.M. said was in the garage of the house where he was kidnapped. They found a nine millimeter Browning pistol that Voyt had registered in 1984 and that matched the description of the pistol M.M. described. Finally, the police found a thumb drive in the closet of a bedroom Voyt shared with A.S. containing pornographic images. The thumb drive contained 135 images of very young men, including nine images in which the men were fully nude. In addition, the thumb drive contained one illustrated image of a young man bound to a

chair in a way similar to how M.M. was restrained. A.S. testified that the thumb drive most likely belonged to Voyt.

The house where Voyt and A.S. lived in 2001 was located less than a mile from where M.M. was kidnapped. Both A.S. and a police detective confirmed that the house matched several of the details of M.M.'s description of the house where his kidnapper took him. The house had a pool in the backyard with glass sliding doors leading from the dining room. It also had an office with a desk and office chair with rolling wheels, and an adjacent bathroom with a shower.

Although M.M. and O.H. identified Voyt in court as the perpetrator, M.M. could not identify a 2001 photograph of Voyt from a six-pack photographic lineup. A witness testified on behalf of Voyt that, on the day and location of the kidnapping, she saw an older man walking with a middle-school-aged boy, and another boy of about the same age running in the opposite direction. The witness saw the man push the boy into the passenger door of the car, but it did not appear that the boy was screaming or struggling to get away.

## DISCUSSION

Voyt contends that the trial court abused its discretion by admitting as evidence (1) a pornographic illustration of two men, one of whom is depicted as restraining the other man in a chair; (2) nine nude photographs of young, possibly underage men; and (3) plastic zip-ties and a metal nutcracker similar to the ones M.M. described in his testimony about the kidnapping. We hold that the trial court acted within its discretion with respect to the illustration and photographs, and that any error in admitting the other challenged evidence was harmless. Both Voyt and the People agree that the trial court erred in its assessment of fines. We will remand the case for reconsideration of these fines.

### A. *Principles Regarding the Admission of Evidence*

All of Voyt's contentions on appeal involve the trial court's decisions regarding the admission of evidence at trial. We describe the principles common to all of these issues at the outset.

Under the Evidence Code, only relevant evidence is admissible (Evid. Code, § 350), and "[a]ll relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution." (*People v. Basuta* (2001) 94 Cal.App.4th 370, 386; accord, Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) " ' " ' "The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' " ' " ' " (*People v. Ghobrial* (2018)

5 Cal.5th 250, 282.) The trial court lacks discretion to admit irrelevant evidence. (*Id.* at p. 283.)

Even if evidence is relevant, however, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review the trial court's decisions regarding the admission of evidence for abuse of discretion. (*People v. Basuta*, *supra*, 94 Cal.App.4th at p. 386.)

The traditional standard from *People v. Watson* (1956) 46 Cal.2d 818, 836 is the test for harmless error. Thus, we will reverse only "if we determine it is reasonably probable that a result more favorable to the defendant would have occurred" if not for the erroneous admission of evidence. (*People v. Hayes* (1989) 49 Cal.3d 1260, 1269.)

### B. *The Thumb Drive Illustration*

In their search of Voyt's apartment, the police discovered a thumb drive that A.S. testified most likely belonged to Voyt. Among the images stored on the drive was an illustration depicting two young men with their pants unzipped displaying their erect penises. One of the men is standing and holding the other man by the throat. The second man is seated in a chair restrained by his wrists and ankles, with a choke collar or belt around his neck. Both of the men are ejaculating, and the seated man also has ejaculate coming out of his mouth.

Voyt contends that the trial court abused its discretion by admitting the illustration into evidence. He argues that there was no evidence regarding when Voyt obtained the illustration, nor whether it was in his possession at the time

of the kidnapping. He also argues that the potential prejudice of the illustration substantially outweighed its probative value. In addition, for the first time on appeal, he contends that the illustration was inadmissible as hearsay. We are not persuaded by any of these arguments.

First, the illustration was relevant regardless of whether Voyt owned it at the time of the kidnapping. The image depicted the same specific unusual sexual scenario that, according to M.M.'s testimony, Voyt perpetrated against him. Voyt's possession of the image served to corroborate M.M.'s testimony. If Voyt obtained the image before he kidnapped M.M., it would suggest that the kidnapping was a means to enact this sexual fantasy. But even if Voyt obtained the image years later, it would indicate that Voyt kept the illustration as a memento of the crimes he committed against M.M. Voyt argues that the illustration was not relevant because he did not personally create it. He relies on *People v. Zepeda* (2008) 167 Cal.App.4th 25, 32–35, in which the trial court held that violent rap lyrics were relevant because the defendant wrote them. The case is inapposite. Here, although the evidence was not relevant to show that Voyt had created the image (nor did the prosecution so argue), it was relevant to show that Voyt was saving an image similar to the victim's description of what Voyt had done to him. The illustration was probative of Voyt's state of mind simply because he kept it.

We also disagree that the probative value of the illustration was "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice." (Evid. Code, § 352.) Evidence is unduly prejudicial under section 352 not because it is damaging, but because it

" ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The illustration could indeed evoke a strong emotional bias against Voyt among jurors who could be offended by its content, but at the same time it was also very probative. In balancing the prejudice versus the relevance, the trial court did not abuse its discretion by determining it was not substantially more unduly prejudicial than probative.

Finally, Voyt's hearsay argument fails because he failed to raise it in the trial court. (See *People v. Jennings* (2010) 50 Cal.4th 616, 654.) In any case, it also fails on the merits. Voyt analogizes the illustration to the drawings our Supreme Court ruled inadmissible in *People v. Lewis* (2008) 43 Cal.4th 415, 496–498 (*Lewis*), overruled on another ground by *People v. Black* (2014) 58 Cal.4th 912, 919–920. In *Lewis*, the trial court allowed the prosecution to introduce drawings apparently created by a codefendant showing details of the defendant's crimes. (*Lewis*, *supra*, 43 Cal.4th at pp. 496-497.) The Court held that these drawings were hearsay because "the jury was asked to conclude that they were intended as a substitute for verbal expression and conveyed the truth of the assertion that defendant committed robberies with a sawed-off shotgun." (*Id.* at p. 498.) That is not the case here. The prosecution did not argue that the illustration was meant literally to depict Voyt and M.M. The illustration is relevant not for the truth of what the artist drew, but because Voyt had it in his possession. Because there was no error in admitting the evidence, contrary to Voyt's assertion, his trial counsel did not render ineffective assistance by failing to object on the basis of hearsay.

### C. *The Thumb Drive Photographs*

In addition to the illustration of the two men, the police also found 135 additional sexually suggestive images on the same thumb drive. Among these images were nine photographs of fully naked young men. The trial court admitted these nine photographs into evidence on the grounds that they were probative of Voyt's motive and intent, and that they corroborated Voyt's interest in young men. The trial court stated that in its opinion, the photographs depicted young men between the ages of 15 and 20 years of age, but the prosecution introduced no evidence to show that the boys were underage, nor was Voyt charged with possession of child pornography.

Voyt contends that the trial court abused its discretion by admitting the photographs. He argues that the images were not relevant because it was not clear when Voyt obtained them, and because he was not charged with possession of child pornography. He also argues that the images should have been excluded because they were likely to confuse the issues or mislead the jury.

This is a close issue because the probative value of the photographs alone was relatively weak. The photographs were not necessary to prove that Voyt was sexually attracted to men. At most, the photographs may have helped the prosecution show that Voyt was attracted to young men in particular. But as Voyt points out, the fact that he had the photographs in 2017 was of minimal relevance to his sexual proclivities 16 years earlier.

We are not persuaded, however, that the admission of the photographs constituted prejudicial error. There was no "substantial danger" that the photographs would, as Voyt claims, "confus[e] the issues, or . . . mislead[] the jury" (Evid. Code, § 352) into convicting Voyt on the basis of the photographs rather than

on his conduct. Although the trial court discussed with the attorneys the possibility that the photographs depicted children under the age of 18, neither the court nor the prosecutor claimed that the possession of the photographs in itself was a crime. If the jury, nevertheless, perceived the possession of the photographs as potentially criminal, the photographs were still "far less inflammatory than the evidence of" the charged kidnapping and molestation. (*People v. Case* (2018) 5 Cal.5th 1, 32.) It is unlikely that the jury would vote to convict Voyt of the far more serious crimes of kidnapping and forced oral copulation in order to punish him for possession of the photographs. (See *ibid.*)

Finally, even if the trial court erred by admitting the evidence, the error was harmless. In other words, we do not agree that "it is reasonably probable that a result more favorable to the defendant would have occurred" if the trial court had excluded the photographs from evidence. (*People v. Hayes*, *supra*, 49 Cal.3d at p. 1269.) The presence of these nine photographs could not have made a difference in the case in light of the strong additional evidence of guilt, including Voyt's DNA, the location of his house near where M.M. was kidnapped, and the statements M.M. made about his experience. M.M. described several details about what he saw that matched Voyt's living circumstances and possessions, including the layout of the house, the car Voyt had in his garage, the gun that was similar to the one registered to Voyt, and the picture of Voyt and A.S. that M.M. saw in the bedroom.

### D. *The Zip-Ties and Nutcracker*

During the search of Voyt's apartment, the police discovered four plastic zip-ties in Voyt's bedroom closet, as well as a metal nutcracker in a kitchen drawer. A.S. testified that

these items did not belong to A.S. himself, and thus, most likely belonged to Voyt. The prosecution introduced the zip-ties and nutcracker at trial, and M.M. testified that the zip-ties were "similar" to the items Voyt had used during the kidnapping, and that he could not remember if the nutcracker resembled the one Voyt used on him.

Voyt contends that the zip-ties and nutcracker were not relevant and were significantly more unduly prejudicial than probative, and that the trial court abused its discretion by admitting them into evidence. He argues that these items are common household objects with no clear connection to the crimes that occurred 16 years earlier.

We need not decide whether the trial court erred by admitting the evidence because any error was harmless under any standard of review. As we have already discussed (see Discussion part B, *ante*), the evidence connecting Voyt to the crime was overwhelming.

Voyt's claim of ineffective assistance of counsel also fails. In order to establish ineffective assistance of counsel, a defendant must show not only that his attorney's performance was deficient, but that those errors prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) This means showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) The evidence of Voyt's guilt was so strong that it is not reasonably probable that omitting the evidence he complains of would have changed the outcome.

### E. *Fines and Fees*

In addition to the prison term, the trial court imposed a $400 fine pursuant to section 290.3, as well as a $680 penalty assessment fee, for a total of $1,080. Section 290.3, subdivision (a) requires the trial court to impose a fine of $300 for a defendant's first conviction of certain sex offenses, subject to the defendant's ability to pay. At the time of Voyt's offense in 2001, the amount of the fine was $200. (See former § 290.3, added by Stats. 1988, ch. 1134, § 1, p. 3637, amended in relevant part by Stats. 2006, ch. 337, § 18, pp. 2610–2611.) The trial court did not make an express finding of Voyt's ability to pay, nor did the court describe in the abstract of judgment how it arrived at the amount of the penalty assessment fee, which was most likely the sum of several different statutory fees.

Both sides agree that the trial court erred. The Attorney General does not dispute Voyt's contention that the fine under section 290.3 should not exceed $200 and also argues that the trial court was required to "separately list, with the statutory basis, all fines, fees and penalties imposed on each count" (*People v. High* (2004) 119 Cal.App.4th 1192, 1201) in the abstract of judgment, rather than lumping them all in together in a single entry. We agree, and we will remand the case for a new hearing to determine the correct amount of all fines and fees, as well as Voyt's ability to pay.

## DISPOSITION

The judgment of conviction is affirmed. On remand, the trial court shall hold a new hearing to determine the correct amount of all fines and fees, as well as Voyt's ability to pay.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.